No. 16557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RONALD RALPH PEPENDREA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

Miscellaneous

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APPELLEE'S BRIEF.

A.

Statement of Jurisdiction.

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging the appellant guilty under both counts of a two-count indictment. Each count charged appellant with the robbery of a national bank under Title 18, United States Code, Section 2113(a)(d) [T. R. 10].[1] Count One charged a robbery of the Bank of America National Trust and Savings Association, Vermont-Melbourne Branch, located in Los Angeles County, State of California. Count Two charged a robbery of the Bank of

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[1]T. R. refers to the Reporter's Transcript of Proceedings.

America National Trust and Savings Association, Bakersfield Branch, located in Kern County, State of California. Each said County is within the Central Division of the Southern District of California.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code.

This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

B.
Statement of the Case.

The indictment, in two counts, charges, in Count One [T. R. 11] that on or about July 29, 1958, the appellant, together with an accomplice, Lawrence Allison Hobart, "by force and violence, knowingly and wilfully took from Mrs. Carol Davis, teller, $1,474.00" belonging to the bank.

In Count Two it was charged that appellant, on or about July 22, 1958, "by force and violence, knowingly and wilfully took from Mrs. Lois Marie Fox, teller, $300.00" belonging to the bank.

The accomplice, Hobart, was tried along with appellant in the instant trial. The jury did not agree on a verdict [T. R. 325] as to Hobart. Hobart was subsequently tried and convicted and he has initiated an appeal to this Court which has not as yet been brought on to hearing.

The jury returned a verdict of guilty as to appellant on both counts of the indictment [T. R. 314]. The jury also returned special findings as to each count [T. R.

315] in which it concluded that appellant did not put in jeopardy the lives of the tellers in question by the use of a dangerous weapon.

C.
Statement of Facts.

The case was tried from the inception of the trial to its conclusion upon the assumption that the indictment charged a robbery "by force and violence or by intimidation." This assumption was apparent in the remarks of the prosecuting attorney in his opening statement [T. R. 14] wherein he stated:

> "The first element is that the Government must prove to your satisfaction beyond a reasonable doubt that by force and violence or by intimidation the defendants, or one of them . . . took from the person or presence of another person . . . money belonging to or in the care, custody, control, management or possession of a bank."

It was further assumed in the opening statement that the question of intimidation was an essential element of the crimes charged [T. R. 13].

This assumption was also made by the Court in its instructions [T. R. 292] in that it instructed in the words of the statute that a robbery is committed by taking the property of another: "by force or violence or by intimidation."

There was never any intimation on the part of either defendant during the entire trial that the use of the word "intimidation" was regarded as improper. Each defendant

was informed that he might object to the instructions [T. R. 286] and concerning some parts of the instructions each defendant did object [T. R. 307]. However, neither defendant objected that the instruction concerning intimidation was improper. No objections were made to the remarks of the prosecuting attorney in his opening statement. No objections were made to similar remarks of the prosecuting attorney on closing argument [T. R. 280].

On the basis of the entire record it can fairly be concluded that each defendant assumed, as did the Court and the Government, that "intimidation" was a part of the crime charged. The question is now raised entirely as a matter of hindsight unsupported by any objection at the time of trial.

In support of the crimes charged in the indictment the two bank tellers testified for the Government. Lois Marie Fox, teller of the Bank of America, Bakersfield Branch [T. R. 25, 26] positively identified appellant as the person who robbed her on July 22, 1958. Mrs. Carol Davis, teller of the Bank of America, Vermont-Milbourne Branch [T. R. 50], also described appellant in considerable detail [T. R. 51], and identified him as the robber [T. R. 52]. These positive identifications were further fortified in each case with positive identification of the distinctive clothing worn by appellant at each robbery: an ivy-league cap, a striped shirt worn outside the trousers, and khaki-colored trousers [T. R. 51, 30].

In the case of each robbery the *modus operandi* was identical. The robber walked up to the window of the teller's cage, laid a money bag on the counter, and said, "Fill it up." [T. R. 27, 53]. Each teller thought he was kidding or fooling [T. R. 27, 53] and in each case the robber said something to the effect that he was not kidding and again ordered the teller to fill up the bag, this time exhibiting a gun [T. R. 25, 53]. Following this exhibition, each teller acceded to the demand and filled up the bag with the money that was on her counter.

Witness Fox testified:

> "I was wondering actually what I should do, because I didn't want to give him the money and yet there was the gun." [T. R. 29].

She further testified:

> "He pulled his shirt back and exposed the gun as he was telling me he was not kidding." [T. R. 38].

She became afraid [T. R. 48] although the gun was never actually pointed at her [T. R. 49].

Carol Davis testified:

> "The Witness: He said, 'Fill it up.'
>
> And I said, 'With what?'
>
> And he said, 'With everything you have got in the drawer,' and I laughed, thinking he was just joking around.
>
> I said, 'You shouldn't fool like that. Now, what do you want?'

He said, 'I am not fooling,' and he picked up his shirt and underneath it was a white undershirt with a gun stuck in the belt underneath the pants.

He said, 'Now, do as I say.'

I realized then he wasn't kidding and there was no one else around and I became scared and I just started looking at him real good, figuring if there wasn't anything else I could do, I could see what he looked like.

I took the money I had just put in my drawer and stuffed it in the bag, and I was sitting on a stool during this time and I sort of got up to rise and he said, 'don't move when I leave, or else,' and he turned around. As soon as he turned around I ran to my manager in the bank, telling him what happened."

Mrs. Davis further testified:

"A. Well, he lifted his shirt and threatened, and said, 'I am not fooling,' and I saw a gun there; I just knew it was.

Q. You say you saw a gun. Was that all you saw, was the top— A. The top half.

Q. When he threatened, did he do anything other than simply say, 'I am not fooling?' A. That's right. But the way he said it.

Q. Did that frighten you? A. Excuse me?

Q. Did that frighten you, when he said, 'I am not fooling?' A. Yes, at that point I became frightened."

Following the commission of the offenses charged in the indictment the appellant was interviewed by a Special Agent of the Federal Bureau of Investigation, Thomas

B. White, Jr. This interview took place at the Federal Correctional Institution at La Tuna, Texas [T. R. 65] where appellant was a prisoner in connection with an unrelated offense [T. R. 68]. Prior to the interview, appellant had been advised of his constitutional rights [T. R. 66, 67]. Appellant denied guilt on the first interview [T. R. 67]. Subsequent to this a prison break occurred in which appellant was involved [T. R. 67]. After this incident appellant called for Mr. White and told White that he wanted to talk about the robberies [T. R. 69]. Appellant agreed that the prison break, and his subsequent incarceration in the "hole" had nothing to do with Mr. White [T. R. 86]. Appellant attempted to explain his confession to Mr. White with the explanation that he gave this confession as a means to get out of the hole [T. R. 88] and that he made false statements in the confession because he believed he could later thereby prove that the confession was not a true one. This remarkable assertion was followed by a series of admissions that most of the material parts of the confession were in fact true [T. R. 89-94]. The confession, in two written statements, was received in evidence as Plaintiff's Exhibit 8 and 9 [T. R. 115, 104].

Appellant was sentenced on April 28, 1959 [T. R. 331]. Before sentence the Court ordered a pre-sentence investigation and report by the United States Probation Office [R. 29].[2] Before imposing sentence the Court briefly reviewed some of the previous convictions of this

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[2]R. refers to the Transcript of Record.

appellant [T. R. 331]. the Court gave a full explanation to appellant in which it set out the reasons for the sentence being imposed [T. R. 333] and the Court thereupon imposed the maximum term of years permissible under each count [T. R. 334].

D.
Statute Involved.

Each count of the indictment was based upon Title 18, United States Code, Section 2113, which provides in pertinent part as follows:

> "(a) Whoever, by force and volence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association . . . shall be fined not more than $5,000 or imprisoned not more than 20 years, or both."

A further portion of this statute is also applicable. Subsection (d) provides, in part, as follows:

> "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than 25 years, or both."

ARGUMENT.

I.

The Supposed Variance Between the Charge and the Evidence Now Asserted by Appellant Was Waived by His Failure to Object Thereto at the Time of Trial.

The objection of appellant, that there exists a variance between the charge and the evidence adduced at the time of trial, cannot be asserted on this appeal unless it was urged in the trial court.

Harris v. United States, 227 U. S. 340;
11 Cyc. of Federal Procedure, Sec. 42.232;
Swafford v. United States, 25 F. 2d 581.

Stated in another way: The variance now urged by appellant is cured by the verdict.

Wilson v. United States, 158 F. 2d 659.

II.

The Defendant Was Not Misled nor Placed in Double Jeopardy by the Supposed Variance.

A variance is, of course, not material, unless the accused is thereby misled, placed in double jeopardy or prejudiced in his substantial rights.

Washington and Georgetown R. Co. v. Hickey, 166 U. S. 521;
Berger v. United States, 295 U. S. 78, 83;
Federal Rules of Criminal Procedure, Rule 52(a).

These question are factual determinations that must be made *based upon the record as compared to the charge.* The significance of the defendant's contention is neces-

sarily accentuated in a factual context where the question is a close one, a question which certainly does not exist in this record.

Wilson v. United States, 250 F. 2d 312, 325 (9th Cir.)

In the foregoing case this Court reversed a conviction in a case in which there was a failure on the part of the Court to distinguish between "wilfull failure to pay a tax" and "wilfull attempts to defeat and evade" such tax. In such a case, clearly, considerable ambiguity may arise through failure of the trial court to properly distinguish between two such difficult and, in that case, important, concepts. The distinction between the two terms meant the difference between a misdemeanor as against a felony conviction to the defendant in the *Wilson* case.

In the instant case there was no surprise to the appellant by virtue of the now-asserted variance. All parties assumed at all times during the trial that the appellant was charged under both theories. Furthermore, a conviction in this matter does not leave appellant open to another prosecution for the same offense. Under these circumstances, there is no variance affecting the substantial rights of the appellant and the now-asserted variance should be disregarded on appeal.

Smiley v. United States, 186 F. 2d 903 (9th Cir., 1951.)

III.

Inasmuch as the Evidence Established That "Force" Was Used in the Commission of the Offense, There Was, in Fact, No Variance, as Now Asserted by Appellant.

Appellant contends that there must be either one of two things charged and proved in order to avoid the stigma of variance. Appellant contends that under a charge of "force and violence" there must be actual physical violence exerted upon the person of the victim; he further contends that under a charge of "intimidation" the evidence need only be that the victim was "put in fear." (Appellant's Br. p. 2).

This contention is based upon appellant's interpretation that, from the wording of the statute, it must be presumed that Congress intended two alternative means by which the crime of robbery might be committed. It is perhaps pertinent to observe that Congress does not, in every case, neatly distinguish between the various alternatives in alternative language used by it in its statutes. Witness, for example, the words "obscence, lewd, lascivious, or filthy" in the statute dealing with the mailing of material of that general nature.

Title 18, United States Code, Sec. 1461.

This Court, and the United States Supreme Court as well, have spent considerable energies in attempting to deal with but one of the four words of the foregoing statute; as to the remaining three words, lewd, lascivious and filthy, no satisfactory definition has yet been determined upon. (See *United States v. Roth,* 237 F. 2d 796, 799; *Roth v. United States,* 354 U. S. 476.) The reason for this difficulty is rather obvious, considerable redundancy appears in the four words used in the statute.

In much the same way, the word "intimidation" is essentially redundant because of the interpretation that has been applied through the centuries to the words "force and violence." The word "force" is defined in Black's Law Dictionary, Third Edition, as follows:

> "Power dynamically considered, that is, in motion or in action; constraining power, compulsion; strength directed to an end. Usually the word occurs in such connection as to show that unlawful or wrongful action is meant."

The word "violence" is there defined as follows:

> "The abuse of force. That force which is employed against common right, against the laws, and against public liberty. Violence is synonymous with physical force, and the two are used interchangeably in relation to assaults, by elementary writers on criminal law."

The word "force" is perhaps better defined by reference to its synonyms. They are:

> "1. To do violence to; especially to ravish; violate.
>
> 2. *To constrain or compel; to coerce.*
>
> 3. *To impose or cause by necessity.*
>
> 4. To impel, wrest, extort etc. by violence.
>
> 5. To obtain or win by strength or struggle . . .
>
> 6. *To press or urge for acceptance;* as, to force attentions upon one.
>
> 7. To exert to the utmost; to urge; hence, to strain; to urge to, or produce by unnatural effort; as to force a laugh . . ."
>
> Webster's New Collegiate Dictionary, 1956 Edition.

The word "intimidate" is there described as:

> "To make timid or fearful; to inspire or affect with fear; specifically to deter, as by threats; overawe; cow."

From the very earliest days the word "force" appears to have been used interchangeably with the word "violence" and the phrase "putting in fear." Blackstone defined "robbery" as follows:

> "Open and violent larceny from the person, or robbery, by rapine of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear."
>
> 2 Jones' Blackstone 2456.

Blackstone then went on to define the elements of robbery as follows:

> "1. There must be a taking, otherwise there is no robbery . . .
>
> 2. It is immaterial of what value the thing taken is: A penny as well as a pound, thus forcibly exerted, makes a robbery.
>
> 3. Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing."
>
> *Ibid.*, page 2457.

Blackstone went on to say, in referring to the indictment:

> "Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient if laid to be done by violence."
>
> *Ibid.*, page 2457.

The terminology is archaic, but one gathers that in Blackstone's day as in the present day, robbers were charged with forceful and/or violent robberies without reference to the "putting in fear" aspect of the thing. In the language that immediately follows the last quotation, Blackstone states:

> "And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent . . . Or, if a person with a sword drawn begs an alms, and I give it to him through mistrust and apprehension of violence, this is a felonious robbery."
>
> *Ibid.,* page 2457.

Appellant has cited four cases on page 3 of his brief which purportedly hold that "actual personal violence" must be present in order to constitute "force" as used in the statute. None of these cases deal with the statute itself. They are furthermore easily distinguished.

Rivers v. State, 169 S. E. 260 (46 Ga. App. 778) dealt with three different statutes, one defining assault and battery, and two separate robbery statutes which are not set out in the opinion. It was obviously necessary to distinguish the statutory language as used in these particular statutes because the penalties in the various statutes differed considerably, depending upon the amount of force that was used.

State v. Sawyers, 29 S. E. 2d 34 (224 N. C. 61) is really authority for the Government's position in the instant appeal. In this case three sailors were unburdened of their money by five men who had driven the sailors down a dirt road at night and had overcome their resistance by verbally stating "This shakedown." The Court held this evidence sufficient to prove a common law robbery. The Court stated:

> "Generally *the element of force in the offense of robbery may be actual or constructive.* Although actual force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property . . . Under constructive force are included 'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking.' No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or genture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear." (Emphasis added.)

The Court held that "upon an indictment for highway robbery at common law it is not necessary to prove both violence and putting in fear—*proof of either is sufficient.*"

In *Cannon v. State,* 107 P. 2d 809 (71 Okl. Cr. 42), the case next cited by appellant, the Court distinguished robbery from larceny. Although the Court does say,

"The violence must be actual, personal violence," it further goes on to say at page 810:

> "But the degree of force used is immaterial, except under statutes which provide for a punishment varying with the violence which accompanies the taking. *If putting in fear is proved the offense is robbery.*" (Emphasis added).

Nelson v. State, 46 S. E. 2d 488 (233 Ga. 330), the last case cited by appellant, dealt with the unique situation in which the "robber" was himself acting under the duress of a co-prisoner during a prison break in which the sheriff was robbed. The defendant did not himself exercise any more force than was necessary to remove the sheriff's wallet from his pocket. This was done under the instructions of the co-prisoner who had a gun. The Court made the distinction that this did not constitute actual violence and reversed the judgment on this and other grounds. The case is additionally distinguishable for the reason that it dealt with a statute charging "*open* force and violence" as distinguished from "force or intimidation," and providing for the death penalty in the event open force and violence was used. Obviously, in this situation, the legislature intended something more than the common law definitions of the terms "force and violence."

While no cases interpreting the words "force and violence" as distinguished from the word "intimidation" are found in the annotations following Section 2113 of Title 18, United States Code, it is apparent that Congress had in mind, at most, the common law definition of the terms. In view of the foregoing authorities it is respectfully submitted that the appellant in this case was properly charged with, and proven guilty of the offense in

question. For further authorities to the effect that the word "force" as a verb is equivalent to constraint or compulsion by moral or intellectual means as well as by actual physical violence.

See:

36 C. J. S. 1139;
77 C. J. S. 525;
43 Cal. Jur. 2d 94 (2d par.).

IV.

Irrespective of the Asserted Illegality of Appellant's Confession There Existed No Grounds to Review His Convictions Inasmuch as They Are Amply Supported by Other Evidence.

Appellant's somewhat novel contention that his confessions were improperly received in evidence because they were assertedly given after a period of detention that was entirely unrelated to the confessions themselves need not be passed upon by this Court. Even where an illegally obtained confesson is erroneously sent to the jury together with other evidence in the case, the case presents no basis for review if the other evidence will itself sustain the verdict of guilty.

Stein v. New York, 346 U. S. 156, 190 (1953).

The record in this case, irrespective of the confessions, conclusively and irrefutably establishes the appellant's guilt. This Court consequently has no duty to inquire further concerning whether the confession was or was not legally obtained. Although it has been held that voluntary statements and confessions may not be admitted into evidence when obtained during an illegal detention, as where the defendant was detained an unreasonable

time before being brought before the Commissioner (*McNabb v. United States,* 318 U. S. 332), there is certainly no authority for appellant's contention that a voluntary confession should be excluded from evidence because of a *legal* detention which was unrelated to the taking of the confession except as a matter of pure coincidence.

V.

The Court Did Not Abuse Its Discretion in Imposing a Sentence of Forty Years in View of Appellant's Prior Record.

At the time of imposition of sentence the Court stated:

> "We have to consider the public welfare in these things, as well as the welfare of the defendant. You have been pretty much at odds with the kind of conduct which the social order can prevent within its confines. You just can't have people engaging in constant criminality without doing something about it. I don't do it so much to punish you as to sort of in a way as we quarantine someone when they have smallpox." [T. R. 333.]

It is hornbook law that four theories must be present in the Court's mind every time sentence is imposed upon a defendant who has been convicted of an offense. The Court must consider: (1) Rehabilitation; if a human life can be salvaged it is always the duty of the Court to take such action at the time of sentencing as will appropriately insure the rehabilitation of a defendant; (2) Punishment; although this assertedly principal objective has been thrust into the background in recent years, it remains a very active consideration at the time of sentence (if only because punishment does sometimes reha-

bilitate); (3) Deterrency; a perhaps overworked theory; and finally (4) Protection of society; in the case of a hopeless offender society is entitled to as much protection as the Court can give at the time of sentencing.

Taking into account the previous record of this defendant and the efforts made at rehabilitation previously [T. R. 331], it should not be said as a mttter of law that the Court abused its discretion in imposing the maximum possible sentence. It should be remembered furthermore that the entire probation report is not before the Court on appeal. Consequently, there is no way of knowing from the record what additional considerations may have influenced the Court in imposing the sentence that it did. If this were the first offense of this defendant a different picture would be presented.

Conclusion.

Appellant has raised the question of the variance supposedly existing between the charge and the evidence too late. The variance, if any, was cured by his failure to object and by the intervening verdict of guilty. A review of the entire history of the words used in the statute does not substantiate appellant's contention that a variance in fact exists inasmuch as the words of the statute have been used almost interchangeably throughout the history of their use. The evidence in the instant case establishes that "force and violence" as those terms are used in the statute was, in fact, exercised by appellant in the commission of the offense inasmuch as he made an unmistakable show of force while displaying an apparently dangerous weapon thereby overcoming the resistance of the two bank tellers. In any event, appellant was not prejudiced by the supposed variance inasmuch as he tried

the case on the same theory as did the Government, was not surprised by the evidence, and will suffer no double jeopardy by reason of the claimed variance; it is therefore immaterial under Rule 52 (a), Federal Rules of Criminal Procedure. The sentence imposed was manifestly within the Trial Court's discretion and should not be disturbed.

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